United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1725

ORIGINAL

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P/S

UNITED STATES

COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOYCE J. BEAM,

Appellant,

vs.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES, AND PILOTS; THOMAS F. O'CALLAGHAN As President of the International Organization of Masters, Mates, and Pilots; MASTERS, MATES AND PILOTS WELFARE PLAN; STEPHEN P. MAHER, As Administrator of the Masters, Mates and Pilots Welfare Plan; H.M. STEGALL, As Chairman of the Board of Trustees of the Masters, Mates, and Pilots Welfare Plan; and MARTIN F. HICKEY, as Secretary of the Board of Trustees of the Masters, Mates, and Pilots Welfare Plan,

Appellees.

BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

HONORABLE LAWRENCE W. PIERCE, Judge

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SUBJECT INDEX

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Cont.)

CASES

TABLE OF AUTHORITIES (Cont.)

CASES

STATUTES

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STATEMENTS OF ISSUES PRESENTED FOR REVIEW

The appellant's deceased husband, Russell Beam, was a member of the Masters, Mates & Pilots Welfare Plan, a labor-management trust established to provide benefits for eligible licensed deck officers in the American Merchant Marine. The plaintiff is Mr. Beam's widow and beneficiary. The Plan is

subject to Section 302 of the Labor Management Relations Act, 29 USC §186(c)(5). It provides certain benefits for injury or death "sustained solely through external, violent and accidental means, directly and independently of all other causes." Russell Beam suffered burns over twenty-five percent of his body in a hotel fire and died in a hospital eighteen days later. Mr. Beam's treating physician described him as an alcoholic, and reported: "The incident of the burn * * * interrupted his alcohol intake and at the same time produced a massive body stress. This particular combination of circumstances is a well known etiologic factor for development of an acute massive pancreatitis which occurred in this instance. The pancreatitis itself was the cause of his death and not a complication of the burn surface itself. However, I think that one could well say that the occurrence of the accident led to a series of circumstances resulting in death." (App. p. 22a). Later, the physician clarified his report to state: "But for the accident resulting in burns covering 25% of his total body surface, there is no indication that this patient would have developed a massive acute pancreatitis and died at that time." (App. p. 40a). The trustees of the Plan refused to pay accidental death benefits, and this lawsuit followed. The District Court granted summary judgment upon motion of the defendants.

The following questions are presented by the appeal:

(1) Whether jurisdiction of the action was properly based upon Section 301 of the Labor Management Relations Act, 29 USC §185, as well as upon diversity of citizenship.

(2) Whether construction of provisions of the Plan is governed by federal law under the principles announced in Textile Workers' Union of America v. Lincoln Mills of Alabama, 353 US 448, 77 S Ct 912, 1 L Ed 2d 972 (1957); and by this Court in Moglia v. Geoghegan, 403 F2d 110 (CA2, 1968).

(3) Whether the District Court, as a matter of either federal or state law is limited, in reviewing the trustees' decision to deny benefits under the accidental death clause in this union welfare plan, "to the issue of whether or not the trustees' decision was arbitrary or capricious, a product of bad faith, or not supported by the evidence which was before them when they made the decision." (Opinion of the District Court, App. p. 47a).

(4) Whether there were material disputes of fact or of mixed fact and law, precluding summary judgment, on the following issues:

(a) Whether Russell Beam died of bodily injuries "* * * sustained solely through external, violent and accidental means, directly and independently of all other causes" or whether his death fell within the exclusion of the Plan for loss caused "wholly or partly, directly or indirectly, by disease, or bodily or mental infirmity, or medical or surgical treatment thereof";

(b) Whether the trustees' decision was in fact arbitrary or capricious, or not supported by the evidence before them.

STATEMENT OF THE CASE

A. Nature of the action.

This is an action by the widow and beneficiary of a deceased seaman for accidental death benefits provided by the

"Masters, Mates & Pilots Welfare Plan," which is essentially a pension, sickness and accident insurance plan established on August 1, 1950, between the International Organization of Masters, Mates & Pilots, and various steamship companies having collective bargaining agreements with the Union, to provide welfare benefits for licensed deck officers employed under and covered by such agreements (App. p. 7a, 8a). The plaintiff, a citizen of the State of Oregon, filed her complaint against the "Masters, Mates, & Pilots Welfare Plan", against the Administrator of the Plan, and against the Chairman and Secretary of the Board of Trustees of the Plan. The plaintiff also named the International Organization of Masters, Mates & Pilots and the president of the union as additional defendants.

The plaintiff asserted two bases of jurisdiction. (1) She alleged diversity of citizenship between herself and all defendants. (2) She alleged also that federal jurisdiction was granted by Section 301 of the Labor Management Relations Act, 29 USC §185, which provides:

> "(a) Suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The complaint alleged that "on or about February 12, 1971, Russell Beam suffered personal injuries in a fire, which injuries resulted in his death on March 2, 1971" (App. p. 5a). Mrs. Beam alleged that, as the wife and designated beneficiary of insurance benefits of Russell Beam under the terms of the

Masters, Mates & Pilots Welfare Plan, she was entitled to an accidental death benefit of $20,000 (App. p. 5a). The complaint prayed for recovery of that sum, together with reasonable attorneys' fees, interest, costs and disbursements (App. p. 6a).

The defendants answered jointly. While denying most of the allegations of the complaint, the defendants admitted that the Plan was a "* * * trust established under an Agreement and Declaration of Trust, dated as of August 1, 1950, by and between the International Organization of Masters, Mates & Pilots and various steamship companies having collective bargaining agreement with the union, to provide benefits for certain licensed deck officers employed under and covered by such agreements." The defendants further admitted that Russell Beam was an eligible employee under the provisions of the Plan and that "Jacqueline Joyce Beam" was named as a beneficiary of Russell Beam (App. pp. 7a, 8a). Affirmatively, the defendants alleged that "* * * the operation of the Masters, Mates & Pilots Welfare Plan is the sole responsibility of eight Trustees appointed by the employers and eight Trustees appointed by the organization; that no individual Trustee, no employee or administrative official, nor any other party named herein has any authority or has exercised any authority to grant or withhold benefits provided by the Welfare Plan." (App. p. 9a). The answer alleged that the individual defendants were improperly named as parties. The answer further alleged that "* * * the Trustees of the Masters, Mates & Pilots Welfare Plan, in denying plaintiff's claim for 'accidental death' benefits did not act capriciously or arbitrarily, but did act reasonably and within the duties and authority given them under

the said Agreement and Declaration of Trust." (App. p. 9a). The answer contained other affirmative allegations not material to this appeal.

On September 17, 1973, the defendants filed a motion for summary judgment, based upon the affidavit of Stephen P. Maher, administrator of the Plan. Attached to the affidavit of Mr. Maher were various exhibits, including those sections of the Plan relating to death and accidental dismemberment benefits, the certificate of death for Russell Beam, a letter report dated April 15, 1971 addressed to the claims manager for the Plan by Dr. Philip F. Parshley Jr., Mr. Beam's treating physician, and a brief report of July 1, 1971 to the claims manager from Dr. Joseph B. Logue, who is described in the affidavit of Mr. Maher as "* * * for many years * * * the medical advisor and medical arbiter for the Trustees." (App. pp. 12a-23a).

The plaintiff filed a memorandum in opposition, accompanied by an affidavit of Mr. Richard Noble, one of plaintiff's Oregon counsel, to which a clarifying report from Dr. Parshley was attached.

On April 1, 1974, the District Court, Honorable Lawrence W. Pierce, D. J., issued a "Memorandum and Order" granting summary judgment in favor of all defendants. The District Judge expressed "serious" doubt whether plaintiff's claim was properly cognizable under Section 301 of the Labor Management Relations Act. He expressed the view that "the * * * day to day administration of these funds is a matter of peculiar concern to the state courts." (App. p. 45a). Following lengthy obiter suggesting that Section 301 was not an appropriate basis

of jurisdiction, the Court concluded that the plaintiff had properly asserted the Court's diversity jurisdiction. The District Judge further stated: "* * * inasmuch as the standard of review of fiduciaries is the same whether federal law, as developed in the eligibility cases, or state law is applied, see, e. g., Kosty v. Lewis, supra, 319 F2d at 747; Gittleson v. DuPont, 17 NY2d 46,49(1966) - this Court will deal with the action as a diversity action without unnecessarily deciding the federal labor law jurisdictional issue." (App. p. 45a).

The District Judge concluded that the Plan granted broad discretion to the Trustees, that the Court's scope of review was "very narrow", and "limited to the issue of whether or not the Trustees' decision was arbitrary or capricious, a product of bad faith, or not supported by the evidence which was before them when they made the decision." (App. p. 47a). The Court concluded that there was no material issue of fact judged by the considerations which the Court deemed controlling (App. p. 55a). The Court did acknowledge that "* * * under the liberal construction which New York law places upon insurance contracts, see Silverstein v. Metropolitan Life Insurance Co., 254 NY 81 (1930), that a court might have reached a decision different from the Trustees." (App. p. 53a). The Order granting summary judgment was entered April 30, 1974. This appeal followed.

B. Summary of facts.

This case was decided by the District Ccourt upon the pleadings, and affidavits attached to the summary judgment papers. The documents before the Court consisted of the complaint, an answer, an affidavit of Stephen P. Maher, administrator of the

Plan, and a counter-affidavit of Richard P. Noble, one of plaintiff's Oregon counsel. Various documents, including medical reports, were attached to the affidavits.

The affidavit of Mr. Maher discloses that the Masters, Mates & Pilots Welfare Plan is a labor-management trust established in 1950 to provide "such benefits as the Trustees might determine" for eligible licensed deck officers in the American merchant marine. The plaintiff's husband, Russell Beam, was an eligible employee under the Plan (App. p. 12a, 13a). Among the benefits provided by the Plan are a death benefit of $20,000, and an additional accidental death benefit of $20,000 (App. p. 12a). The accidental death benefit is governed by Article III, Section 6 (App. p. 15a):

> "Section 6. Death or Dismemberment by Accidental Means.
>
> If an Employee, while eligible hereunder, suffers any of the losses described in Section 7 of this Article, as a result of bodily injuries sustained solely through external, violent and accidental means, directly and independently of all other causes and within ninety days of the date of such injuries, the Trustees shall pay to the Employee, if living, otherwise to the beneficiary, the amount of benefits specified for such loss in Section 7 of this Article, provided, however, that no payment shall be made for any loss caused wholly or partly, directly or indirectly, by
>
> (a) disease, or bodily or mental infirmity or medical or surgical treatment thereof. * * *"

Joyce J. Beam is the widow of Russell Beam, and his beneficiary under the Plan (App. p. 8a).

The Plan is administered by sixteen trustees, eight appointed by the employers and eight by the Masters, Mates &

Pilots Union (App. p. 9a). The plaintiff alleged that the Plan had its principal place of business within the Southern District of New York and/or that its officers and agents were engaged in representing or acting for employee members in that district (App. p. 4a). The defendants did not admit this, either by answer or in the summary judgment papers, although Mr. Maher's affidavit was notarized by defendant's counsel, a New York City attorney and Westchester County Notary Public (App. p. 17a), and it appears from a medical report appended as an exhibit to the affidavit that Mr. Fred J. Criscuolo, Claims Manager for the Plan, has his office at 39 Broadway in New York City (App. p. 21a).

Russell Beam was badly burnt in a motel fire in Portland, Oregon on February 12, 1971. He suffered third degree burns over twenty-five percent of his body (App. pp. 21a-22a). He was admitted to Emanuel Hospital in Portland and remained there until his death on March 2, 1971 (App. pp. 20a-22a).

On March 11, 1971, the plaintiff submitted to the Trustees an application for death benefits which included a copy of the official death certificate (App. p. 20a). The certificate of death states: "DEATH WAS CAUSED BY: immediate cause (a) '<u>acute & chronic pancreatitis</u>' due to, or as a consequence of (c) '<u>acute and chronic alcoholism</u>'." The death certificate lists "25% third degree body surface burns" under the heading "OTHER SIGNIFICANT CONDITIONS: conditions contributing to death but not related to cause given in part 1(a)." (App. p. 20a).

In view of this certificate, the Plan's claims manager, Mr. Fred J. Criscuolo, requested a further explanation from Dr. Philip F. Parshley, who had signed the death certificate and

treated Russell Beam for his injuries (App. pp. 21a-23a). On April 15, 1971, Dr. Parshley mailed a report to Mr. Criscuolo. Dr. Parshley stated that the patient's history "* * * obtained mostly from his wife at that time, was that he had had a chronic alcoholic problem, mostly in the form of acute binge drinking for many years." The report does not indicate whether or how much Mr. Beam drank between "binges". Dr. Parshley further stated:

> "In trying to make a determination as to whether this was a death due to an accident or illness I think the following rather logical sequence will apply. The patient, in an acute alcoholic binge, was seriously burned. The extent of his burn at his age, with his past history of alcoholism, carried a significant risk of mortality. The incident of the burn, quite naturally, interrupted his alcohol intake and at the same time produced a massive body stress. This particular combination of circumstances is a well known etiologic factor for the development of an acute massive pancreatitis which occurred in this instance. The pancreatitis itself was the cause of his death, and not a complication of the burn surface itself. However, I think that one could well say that the occurrence of the accident led to a series of circumstances resulting in death.
>
> I hope I have not confused you with this logic and if I can be of any further assistance in helping you to understand this, I would be most happy to do so." (App. p. 22a, emphasis added).

According to Mr. Maher, the "Trustees", upon receipt of this letter, referred both the letter "and other records" (of an unexplained character) to Dr. Joseph B. Logue of Brooklyn, who "* * * for many years has been the medical advisor and medical arbiter for the Trustees." (App. p. 16a). On July 1, 1971, Dr. Logue wrote to Mr. Criscuolo:

> "After a review of the records, death certificate, and consultation with my associate, it is the opinion that the cause of death was Acute Exacerbation of a Chronic Pancreatitis.

> It is also the opinion of the undersigned that there is not sufficient evidence to warrant an expression of opinion as whether the cause of death was, in any way, accidental." (App. p. 23a).

The "Trustees" then denied the claim for accidental death benefits, acting, according to Mr. Maher, "upon the basis of the death certificate and the opinions of Dr. Parshley and Dr. Logue." (App. p. 17a). (Mr. Maher does not state when or where the Trustees met to decide upon any action involving Mrs. Beam's claim, and his affidavit is barren of any minutes or other record of action by the Trustees. The only name which figures in the exhibits attached to Mr. Maher's affidavit is that of the Plan's claims manager, Mr. Criscuolo.)

However, Dr. Logue had expressed the view that it was impossible to determine, on the basis of the evidence before him, whether death was accidental. Dr. Parshley had offered to furnish further information, if requested to do so, but no one made such a request. After the motion for summary judgment was filed, Dr. Parshley, at the request of plaintiff's counsel, prepared a brief clarifying report. In that report, Dr. Parshley stated:

> "In an attempt to clear up the statements I made in my letter to Mr. Fred. J. Criscuolo dated April 15, 1971, and particularly in reference to the next to last paragraph in that letter, I am writing this current letter.
>
> This patient died of acute and chronic pancreatitis, for which he was predisposed by his acute and chronic alcoholism. But for the accident resulting in burns covering 25% of his total body surface, there is no indication that this patient would have developed a massive acute pancreatitis and died at that time."

The Plan contains several provisions which the defendants contend, and which the District Court found, place actions of the Trustees in granting or denying benefits almost beyond

the scope of judicial review. These provisions are set forth at length in the Argument, infra, pp. 24,25.

ARGUMENT

(1) Original jurisdiction of this action is granted to the Federal Courts by Section 301 of the Labor Management Relations Act, 29 USC §185. In any event, federal substantive law governs the rights and obligations of the parties.

Plaintiff's complaint was based upon Section 301 of the Labor Management Relations Act, 29 USC §185, as well as upon diversity of citizenship, 28 USC §1332. There is complete diversity of citizenship between the plaintiff and all defendants. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs. Accordingly, subject matter diversity jurisdiction existed, and the District Court so found (App. p. 45a).

Because he found that diversity jurisdiction existed, the District Judge declined to decide whether the plaintiff's action was properly cognizable under Section 301 of the Labor Management Relations Act. However, the opinion below dwells at length upon the reasons why, in the Court's view, jurisdiction was not properly asserted under Section 301. The District Judge was of the view that Federal Courts have little interest in labor-management trust funds, stating: "These federal labor laws are not foundation stones for federal court management of union trust funds * * * Where a right sought to be enforced is so uniquely personal and private as to be outside the pale of a federal labor question, this Court has no jurisdiction * * * The day to day administration of these funds is a matter of peculiar concern to the state courts. * * *" (App. p. 44a, 45a). The Court concluded

that the issue need not be decided because "* * * the standard of review of fiduciaries is the same whether federal law, as developed in the eligibility cases, or state law is applied - see, e. g. Kosty v. Lewis, supra, 319 F2d at 747; Gittleson v. DuPont, 17 NY2d 46,49 (1966) * * *" (App. p. 45a).

The District Court's decision on this feature of the case should not be permitted to stand for several reasons. Even if plaintiff's claim was not properly grounded on Section 301, federal substantive law controls this case, because the Court has held that original federal jurisdiction of Section 302 pension fund claims exists under 28 USC §1337, by reason of the existence of a question arising under a statute of the United States regulating interstate commerce. Moglia v. Geoghegan, 403 F2d 110 (CA2, 1968). The governing law does not differ merely because the plaintiff properly claimed jurisdiction upon diversity of citizenship grounds, rather than assert jurisdiction under 28 USC §1337. Kermarec v. Compagnie Generale Transatlantique, 358 US 625, 79 S Ct 406, 3 L Ed2d 550 (1959). Jurisdiction under Section 301 was fairly asserted. Federal substantive law governs Section 301 actions. Textile Workers Union of America v. Lincoln Mills of Alabama, 353 US 448, 77 S Ct 912, 1 L Ed 2d 972 (1957). It is by no means so clear as the District Court's opinion implies that federal and state law are identical or that the federal courts should adopt the state common law with respect to traditional trusts in regulating labor-management trust funds subject to Section 302 of the Labor Management Relations Act.

Finally, the District Court's avowed disapproval of

Section 301 jurisdiction fights the main current of federal decisions on this question.

This appeal raises an issue of jurisdiction which is not of first impression. The beneficiaries of labor-management trust funds have been compelled to file numerous actions for benefits in federal court. Most of the cases involve the United Mineworkers of America, Welfare and Retirement Fund. While federal jurisdiction commonly has been asserted under diversity of citizenship, see, e. g. Pavlovscak v. Lewis, 274 F2d 523 (CA 3, 1959), George v. Lewis, 228 F Supp 725 (D. Colo., 1964), it has been asserted and sustained under Section 301. As early as United Mineworkers v. Electro-Chemical Engraving Co., 175 F Supp 54 (S.D. NY, 1959), the Southern District of New York had held that jurisdiction of a suit by a union against an employer to enforce employer contributions to a trust fund established by a collective bargaining agreement was properly grounded on Section 301 of the Act. The Court ruled that Section 301 applied because the union was not suing to enforce uniquely personal rights of its members, relying upon Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 US 437, 75 S Ct 488, 99 L Ed 510 (1955), now overruled, which had held that actions to enforce personal rights of union members were not within the contemplation of Section 301.

There no longer is any impediment to suits by individuals under Section 301 to enforce uniquely personal rights granted by collective bargaining agreements. Smith v. Evening News Association, 371 US 195, 83 S Ct 267, 9 L Ed 2d 246 (1962) overruled Westinghouse. Furthermore, Smith virtually dictates a conclusion

that Mrs. Beam properly brought her suit under Section 301 of the Act. In overruling Westinghouse, the Supreme Court stated:

> "The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of Section 301 has thus not survived. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interest and many times precipitate grave questions concerning interpretation and enforceability of the bargaining contract on which they are based. To exclude these claims from the ambit of Section 301 would stultify the Congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do."

In Houser v. Farwell, Osmund, Kirk & Co., 299 F Supp 387 (D., Minn., 1969), the Court held that Section 301 conferred federal court jurisdiction of a class action instituted on behalf of Union members against the union and employer to determine rights in a pension plan. The pension plan, which involved a "group deposit administration contract" with a life insurance company, appears to have been established pursuant to 29 USC §186. The District Court determined that it had "* * * subject matter jurisdiction of this controversy under 29 USC §185 inasmuch as there is here involved an alleged contract violation between an employer and a labor organization. Jurisdiction adheres even though the suit is brought by individual members of a labor organization rather than by the Union itself to enforce personal rights if such are embodied in the collective bargaining agreement." (299 F Supp at 389).

In International Union, United Automobile, Aircraft and

Agricultural Implement Workers of America v. Textron, Inc., 312 F2d 688, (CA 6, 1963), the Sixth Circuit held that Section 301 conferred federal jurisdiction in a suit by a union to determine the rights of individual employees under a contract and pension plan, upon termination of the plan. The defendants were the employer and the "* * * trustee or insurance company to whom payments or contributions were to be made by the employer." The District Court had dismissed the action, adopting the employer's contention "* * * that the subject of the action involves peculiarly personal rights of the individual members of the union and that the district court did not have jurisdiction under the Labor Management Relations Act to hear and determine the case." The Sixth Circuit reversed, holding that federal court jurisdiction was conferred by Section 301. The Court quoted from those portions of Smith v. Evening News Association, supra, 371 US 195, which hold that suits to vindicate individual employee rights arising from collective bargaining agreement are not excluded from the operation of Section 301.

Wage claims (which are similar to claims under health and welfare trusts) may be pursued in federal court under Section 301. In Retail Clerks, Local Union 1222 v. Alfred M. Lewis, Inc., 327 F2d 442 (CA9, 1964), the Ninth Circuit upheld jurisdiction under Section 301 of a wage claim filed by a union on behalf of its members. A contention by the defendant that individual wage claims were not within the ambit of Section 301 was described by the Court as "* * * a short horse that is soon curried", in view of the Supreme Court's decision in Smith.

Contrary to the view of the District Court, it now

appears certain from the emerging pattern of cases that an employee claiming violation of rights under a labor-management trust fund has a right to pursue his claim under Section 301 of the Labor Management Relations Act. Furthermore, contrary to the view of the District Court, there are compelling reasons for federal courts to sustain jurisdiction under Section 301. Rights under pension funds or health and accident plans are fringe benefits of employment which are often as important as, or more important to the employee, than his immediate wages. "The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. * * * To exclude these claims from the ambit of §301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." Smith v. Evening News Association, 371 US 195, 200, 83 S Ct 267, 9 L Ed 2d 195 (1962)

The courts can scarcely be unaware of the abuses of large labor-management pension trust funds (for example, the non-vesting provisions of the Teamsters' pension plans), which have prompted Congress to move in the direction of tighter regulation of such Funds. 1/ Furthermore, the federal courts must exercise careful supervision over the procedures by which these

1/ HR2, 93d Congress, passed by the House of Representatives February 28, 1974, and by the Senate March 4, 1974.

Funds, whose operations and trustees often are spread over many states, can be made answerable to court process. If all trustees are necessary parties to a suit for breach of the trust agreement, 2/ federal jurisdiction and conceivably, state court jurisdiction of any kind can be defeated or made cumbersome for claimants. See, for example, Ball v. Victor Adding Machine Company, 236 F2d 170, 172 (CA5, 1956). As a matter of judicial history, these trusts have regularly endeavored to defeat claims by defeating the jurisdiction of courts. See George v. Lewis, 228 F Supp 725 (Dist. Colo., 1964); Rittenberry v. Lewis, 222 F Supp 717 (E.D. Tenn., 1963); Dersch v. United Mineworkers of America, Welfare and Retirement Fund, 309 F Supp 395 (S.D. Ind., 1969); Coverdell v. Mid-South Farm Equipment Association, 335 F2d 9 (CA6, 1964) 3/.

2/ As some courts have held. See, Bitker v. Hotel Duluth Co., 83 F2d 721 (CA8, 1931); Bentinck v. Guaranty Trust Co. of New York, 109 F Supp 827 (S.D., NY 1952) and cases cited in that court's opinion.

3/ See, e.g. Harper v. Lewis, 186 F Supp 285 (Dist. Colo., 1960), in which the District Court described the activities of the United Mineworkers' Pension Fund as follows:

> "This Court is of the opinion that right and justice should know no boundaries. Yet, as we see in this case, the Fund has immunized, or attempted to immunize itself from service of process elsewhere than in the District of Columbia with little regard for ill health and old age of the claimants, and the possible attendant hardships expense, and difficulty of transporting witnesses, etc., that this may work on the claimants who must litigate their claims in distant Washington, D. C. However, what is, or may be more important, the trustees have wrapped themselves in the cloak of immunity from service of process, as exemplified by their refusal to accept service outside the geographical boundaries of the District of Columbia, without proper regard, it would appear, for the effect that such adjudication may have on the substantive rights of the claimants." (186 F Supp at 292).

Although the matter is dehors the record, Mrs. Beam, a

The plaintiff's claim was properly cognizable under Section 301 of the Labor-Management Relations Act, and the District Court should have so held. In any event, federal substantive law governs the interpretation of the Masters, Mates & Pilots Welfare Plan, and the plaintiff's rights to benefits under that Plan. Moglia v. Geoghegan, 403 F2d 110 (CA2, 1968).

(2) The conflicting inferences which may be drawn from the pleadings and summary judgment papers preclude the granting of summary judgment.

All of the normal rules which govern Rule 56 motions for summary judgment militate against the granting of summary judgment in this case. The District Court is obligated to "* * * take that view of the evidence most favorable to the opponent of the moving party, giving the opponent the benefit of all favorable inferences that may reasonably be drawn." Empire Electronics Co. v. United States, 311 F2d 175, 180 (CA2, 1962). Even if the facts are undisputed, summary judgment has to be denied if the trier of fact can draw more than one inference from them. Insurance Company of North America v. Bosworth Construction Co., 469 F2d 1266, 1268 (CA5, 1972); United States v. Perry, 431 F2d 1020, 1022 (CA9, 1970); Equal Employment Opportunity Commission v. United Association, 427 F2d 1090, 1093 (CA6, 1970). Furthermore, summary judgment "* * * is particularly inappropriate where the inferences which the parties seek to have drawn deal with questions of motive,

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citizen of Oregon, is litigating her claim in distant New York City only because the Plan was successful in defeating jurisdiction of a claim filed by her in the District of Oregon, upon jurisdictional grounds.

intent and subjective feelings and reactions." Cross v. United States, 336 F2d 431, 433 (CA2, 1964); Empire Electronics Co. v. United States, 311 F2d 175, 180 (CA2, 1962). Thus, even if the District Court was correct in believing that the Plan gives the Trustees broad discretion to grant or refuse benefits, summary judgment was inappropriate if the trier of fact could infer that the exercise of discretion was (in the District Court's restricted formulation of the scope of judicial review), "arbitrary or capricious, a product of bad faith, or not supported by the evidence."

Except for those provisions of the Plan which, according to the defendants, purport to give the Trustees virtually unreviewable discretion over the payment of benefits, the outcome of this appeal should not be unduly worrisome for Mrs. Beam. The only issue on appeal is whether summary judgment was improperly granted. It has been held that summary judgment is not proper in actions on accident and health policies where the affidavits in support of the motion are no stronger than those in the case at bar. Lewis v. Alcoa SS Co., 57 F Supp 575 (S.D., NY 1944); Hart v. Insurance Company of North America, 458 F2d 379 (CA10, 1972). Furthermore, the claimant might well be entitled to prevail on the merits upon the medical reports filed in this case, under New York law (where the Plan has its office) or under a federal substantive rule no less favorable to the claimant than the substantive law of New York.

Following Silverstein v. Metropolitan Life Insurance

Company, 254 NY 81, 171 NE 914 (1930) 4/, coverage in New York under a policy like ours depends on whether the bodily ailment which "contributes" to injury or death is a "frail general condition" or a progressive disease. McGrail v. Equitable Life Assurance Society, 292 NY 419, 55 NE2d 483 (1944); Salyeer v. Milwaukee Insurance Company, 19 NY2d 696, 225 NE2d 570 (1967); Amend v. Equitable Life Assurance Co., 342 NYS2nd 284 (NY Civil, 1972). In Silverstein, the Court (Cardozo, C.J.) stated:

> "The distinction, then, is to be drawn between a morbid or abnormal condition of such quality or degree that in its natural and probable development it may be expected to be a source of mischief, in which event it may fairly be described as a disease or infirmity, and a condition abnormal or unsound when tested by a standard of perfection, yet so remote in its potential mischief that common speech would not call it disease or infirmity, but at most a predisposing tendency."

The Court also quoted with approval the following distinction drawn by a Massachusetts decision:

> "If there is no active disease, but merely a frail general condition, so that powers of resistance are easily overcome, or merely a tendency to disease which is started up and made operative, whereby death results, then there may be recovery even though the accident would not have caused that effect upon a healthy person in a normal state."

Whether the pancreatitis which was the immediate cause of Russell Beam's death was a "frail general condition," like the duodenal ulcer in Silverstein, the heart condition in McGrail,

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4/ The policy construed in Silverstein provided coverage for bodily injuries "caused directly and independently of all other causes by accidental means" and excluded "accident, injury, disability, death or other loss caused wholly or partly by disease or bodily or mental infirmity or medical or surgical treatment therefor."

or the varicose veins in Salyeer, or a "chronic and progressive disease" like the nephritis which was held to bar recovery in McMartin v. Fidelity and Casualty Co. of New York, 264 NY 220, 190 NE 414 (1934) cannot be determined with any finality from the medical reports or common definitions of "pancreatitis". 5/ The same considerations apply to Mr. Beam's "alcoholism." The record does not disclose how much Mr. Beam drank or how often he indulged in "binge" drinking. Whether alcoholism is a contributing cause of death is, in any event, a question for the trier of fact in a suit on a health and accident policy with coverage and exclusions comparable to ours. Commercial Casualty Ins. Co. v. Stinson, 111 F2d 63 (CA6, 1940); Wolen v. Metropolitan Life Ins. Co., 287 Ill App 415, 5 NE2d 249 (1936); Poole v. Life & Casualty Ins. Co., 47 Ala App 453, 256 SO2d 193 (1971).

Dr. Parshley's initial report to the claims manager for the Plan noted that "an episode of apparently documented pancreatitis occurred approximately ten years prior to this," and further stated:

> "The incident of the burn, quite naturally, interrupted his alcohol intake and at the same time produced a massive body stress. This particular combination of circumstances is a well known etiologic factor for development of an acute massive pancreatitis which occurred in this instance." (App. p. 22a).

Dr. Parshley's clarifying report of October 17, 1973 states:

> "But for the accident resulting in burns covering 25% of his total body surface, there is no indication that this patient would have developed a massive acute pancreatitis and died at that time." (App. p. 40a).

5/ Thus, Merriam-Webster's Dictionary (3rd Ed., Unabridged) defines pancreatitis as "inflammation of the pancreas."

Thus, under New York law, or a federal rule no less restrictive, the plaintiff, as beneficiary of Russell Beam, would probably be entitled to recover benefits for his death under an insurance policy comparable to the provisions of the Masters, Mates and Pilots Welfare Plan. At the very least, the summary judgment papers provide no information upon which a court could confidently hold that the claimant is not entitled to recovery.

Finally, whatever may be the rule elsewhere, in federal court the trier of fact (in our case, a jury, which the plaintiff's complaint demanded) decides issues of causation, and may credit or disregard the testimony of any or all medical witnesses. "The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation.* * * Though this case involves a medical issue, it is no except to the admonition that, 'It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences * * *.'" Sentilles v. Inter-Carribean Shipping Corporation, 361 US 107, 109, 80 S Ct 173, 4 L Ed2d 142 (1959); Wilkins v. American Export Isbrandtsen Lines, Inc., 446 F2d 480, 483 (CA2, 1971); Fitzgerald v. A. L. Burbank & Co., 451 F2d 670, 681 (CA2, 1971); Petition of United States Steel Corporation, 436 F2d 1256, 1265 (CA6, 1970); Canterbury v. Spence, 464 F2d 772, 795 (CA DC, 1972); Trapp v. 4-10 Investment Corporation, 424 F2d 1261, 1268 (CA8, 1970).

(3) The provisions of the Plan do not give the Trustees discretion to decide the merits of individual claims.

The affidavit of Mr. Maher, as administrator of the Masters, Mates and Pilots Welfare Plan, establishes that the Plan consists of two documents: (1) an "Agreement and Declaration of Trust", and (2) "Rules and Regulations" adopted by the Trustees. (App. p. 14a).

It is questionable that the authors of these documents intended to give the Trustees unreviewable discretion to decide the merits of individual claims. Two of the provisions upon which the defendants rely are set forth in the "Agreement and Declaration of Trust".

Article IV, §1 provides:

> "1. Benefits. The Trustees, by majority vote, shall have full authority to determine all questions of the nature, amount and duration of benefits to be paid under the Plan based on what it is estimated the Fund can provide without undue depletion or excessive accumulation."

Article IV, §2 provides:

> "2. Coverage and Eligibility. The Trustees, by majority vote, shall have full authority to determine all questions of coverage and eligibility to participate in and receive the benefits of the Plan and shall have the power to construe the provisions of this Agreement and the terms used herein and any such questions so determined or any construction so adopted by the majority of the Trustees shall be binding upon all parties and persons concerned."

The foregoing provisions appear to govern questions of general eligibility, rather than particular claims. In other words, the Trustees are empowered by the signers of the Agreement

and Declaration of Trust to determine what general classes of employees shall participate in benefits, and what the extent or qualifications for that participation shall be. That responsibility was "exhausted" when the Trustees promulgated an extensive set of "Rules and Regulations" pursuant to the "Agreement and Declaration of Trust" (App. pp. 18a, 19a).

The "Rules and Regulations" contain an additional provision upon which the Trustees rely for their claim of discretion. Article XIV provides:

> "Amendment and Termination
>
> In order that the Trustees may carry out their obligation to maintain within the limits of the funds available to them a sound and economic program dedicated to providing the maximum benefits for employees as a whole, the Trustees expressly reserve the right in their sole discretion and without notice to employees, employers, the union or others affected thereby, but upon a nondiscriminatory basis. * * *
>
> * * * *
>
> (d) To interpret the provisions of these rules and regulations." (App. p. 14a, Emphasis added).

The foregoing provision appears to be no more applicable to Mrs. Beam's case than the two quoted provisions from the "Agreement and Declaration of Trust." The provision contemplates "interpretations" of the Rules and Regulations, and interpretations, moreover, "upon a nondiscriminatory basis." The payment or denial of a claim for benefits does not look like the kind of "nondiscriminatory" interpretation contemplated by this provision. At least one court has recently called attention to the question (but did not decide) whether such a provision applies to decisions to pay or deny benefits in particular cases. McHorse v. Portland General

Electric Company, 98 Or Adv Sh 1715, 1722, --- Or ---, 521 P2d 315, 319 (April 11, 1974).

At least, the meaning of all of these provisions is questionable. If questionable, the case was not ripe for summary judgment. "The burden is on the moving party to show that there is not the slightest doubt as to the facts and that only the legal conclusion remains to be resolved." Insurance Company of North America v. Bosworth Construction Co., 469 F2d 1266, 1268 (CA5, 1972).

Even if the provisions mean all that the defendants claim for them, there is no intimation in Mr. Maher's affidavit that the trustees ever determined "by majority vote" (as required by Article IV, Section 2), or indeed, by any formal action of any kind, that Mrs. Beam was not entitled to accidental death benefits. While the affidavit states that "the Trustees determined" Mr. Beam's death was not within the terms of the accidental death provisions of the Plan (App. p. 17a), Mr. Maher does not state when, where, or how "the Trustees" made that determination, even though the details of any such action are within the defendants' exclusive knowledge.

(4) Section 302 of the Labor Management Relations Act prohibits discretion of the kind claimed by the Trustees and the Plan; even if it does not, the trier of fact could find that the defendants abused their discretion in denying benefits to Mrs. Beam.

Benefits under a labor-management pension plan are not alms and the administrators of such plans are not almoners, free to grant or withhold benefits as the mood moves them. In McHorse v. Portland General Electric Company, supra the Oregon Supreme

Court recently held:

> "The Courts have viewed plans such as these differently, depending on whether the plan calls for a contribution by the employee of the plan; however, it would seem that in a situation where the employee has satisfied all conditions precedent to becoming eligible for benefits under a plan, the better reasoned view is that the employee has a vested right to the benefits. This view sees the employer's plan as an offer to the employee which can be accepted by the employee's continued employment, and such employment constitutes the underlying consideration for the promise. Taylor v. Mult. Dep. Sher. Ret. Bd., 97 Adv Sh 32, 265 Or 445, 510 P2d 339 (1973); Ball v. Victor Adding Machine Company, 236 F2d 170 (5th Cir 1956); Jacoby v. Grays Harbor Chair & Mfg. Company, 77 Wash2d 911, 468 P2d 666 (1970). This approach seems particularly appropriate to the instant case, as here the plan was the result of a negotiated labor contract. See Vallejo v. American R. Co., of Porto Rico, 188 F2d 513 (1st Cir, 1951). Therefore, we view this plan not as a gratuity, but as a contract which forms part of the consideration flowing between the employer and his employees."

And as Judge John R. Brown has stated, speaking for the Court in Ball v. Victor Adding Machine Company, 236 F2d 170 (CA5, 1956):

> "[T]he idea that a pension trust expressly approved, as was this one, by the Internal Revenue Service * * * is a mere gratuity or charitable enterprise beyond even the barest scrutiny by its sole beneficiaries (the employees) is completely out of keeping with the philosophy and purpose of such plans as the means of paying additional compensation to the covered employees and a way to afford substantial and immediate tax advantages to the employer and substantial tax and monetary benefits to the employee. * * *" (236 F2d at 173).

Even if the construction placed upon the discretionary features of the Plan by the District Court and defendants is right,

it does not follow that summary judgment was properly granted. Those provisions, so construed, are probably unlawful. The Plan is subject to Section 302 of the Labor-Management Relations Act, 29 USC §186. Section 302 authorizes labor-management health and welfare trust funds upon condition that several restrictions are met, including the restriction set forth in paragraph (c)(5)(B) that "the detailed basis on which such payments are to be made is specified in a written agreement with the employer * * *." A "written agreement" which authorizes payment only within the discretion of the Trustees or custodian of the Fund does not meet the letter or spirit of this proviso. To the knowledge of plaintiff's counsel, this provision of Section 302 has never been construed, nor has it been made the basis of any challenge to provisions like those discussed above.

Moreover, those few Federal Courts which have said that a trustee is to be granted some discretion under a welfare plan like ours, tend to exercise broad powers of review over that discretion, often to the point of requiring the trustees to apply the court's own common law construction of the trust provisions. Collins v. United Mineworkers of America Welfare and Retirement Fund of 1950, 439 F2d 494 (DC Cir. 1970); Roark v. Boyle, 439 F2d 497 (DC Cir. 1970); Kosty v. Lewis, 319 F2d 744 (DC Cir. 1963). In Sturgill v. Lewis, 372 F2d 400 (DC Cir. 1966), the court held:

> "Since the Trustees perform their function as such pursuant to an act of Congress in an area of social concern and importance, not only to miners like appellant who have applied for a pension, but to future applicants as well whose pension rights may be jeopardized by depletion of the Fund through improper disposition thereof, the proceedings before the Trustees should conform to at least elemental requirements of fairness,

> which requirements in these circumstances normally include, in addition to notice, a hearing at which the applicant is confronted by the evidence against him, an opportunity to present evidence in his own behalf, articulated findings and conclusions having a substantial basis in the evidence taken as a whole, and a reviewable record." (372 F2d at 401).

If the reasonable requirements of Sturgill are applied to the facts developed by the summary judgment papers, the judgment of the District Court should not be permitted to stand.

In his initial letter to Mr. Criscuolo, the Plan's claims manager, Mr. Beam's treating physician, Dr. Parshley, described a "25% third degree burn" which, with Mr. Beam's pre-existing physical disabilities produced an "acute massive pancreatitis." The events described by Dr. Parshley probably would be within the coverage of the Plan under the substantive law of the State of New York, where the Plan had its office, or in any other jurisdiction which adopts the view of Silverstein v. Metropolitan Life Insurance Co., supra, 254 NY 81, 171 NE 914 (1930). Furthermore, Dr. Parshley volunteered: "* * * If I can be of any further assistance in helping you to understand this, I would be most happy to do so." (App. p. 22a). Rather than seek clarification from Dr. Parshley, the claims manager merely referred his letter to Dr. Joseph B. Logue who had been "* * * for many years * * * the medical advisor and medical arbiter for the Trustees." (App. 16a, 17a). Dr. Logue did not venture a finding that the death was or was not accidental. Instead, he wrote to the claims manager "* * * that there is not sufficient evidence to warrant an expression of opinion as whether the cause of death was, in any way, accidental." (App. p. 23a).

Rather than seek additional clarification, the "Fund" denied the claim, although the Maher affidavit does not explain when or where the Trustees met or voted upon that action. After the motion for summary judgment was filed, Dr. Parshley wrote a clarifying report, stating:

> "This patient died of acute and chronic pancreatitis, for which he was predisposed by his acute and chronic alcoholism. But for the accident resulting in burns covering 25% of his total body surface, there is no indication that this patient would have developed a massive acute pancreatitis and died at that time." (App. 40a).

From this record, a trier of fact could fairly infer that the Trustees' decision was "arbitrary or capricious, a product of bad faith, or not supported by the evidence which was before them when they made their decision," (App. p. 47a), if that formulation by the District Court does indeed measure the limits of a Court's power of review. "[W]here the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions", summary judgment "is particularly inappropriate." Cross v. United States, 336 F2d 431, 433 (CA2, 1964).

Labor-management health and welfare Funds are sui generis. Lewis v. Benedict Coal Corp., 259 F2d 346, 355 (CA6, 1959), modified on other grounds, 361 US 459, 80 S Ct 489, 4 L Ed 2d 422 (1960). The Courts have no mandate to apply the law of traditional trusts in dealing with such Funds. Furthermore, the judicial history of Section 302 Trusts, endemic with unfair treatment of beneficiaries both on procedural and substantive grounds, provides no warrant for the Courts to grant broad and unreviewable discretion

to Fund managers. It is questionable whether any provisions of the Masters, Mates, and Pilots Welfare Plan give the Trustees the kind of discretion which they claim in this proceeding. If they do, those provisions probably violate Section 302 which requires that "the detailed basis on which such payments are to be made is specified in a written agreement with the employer", 29 USC §186(c)(5)(B). If not in violation of this statute, provisions granting discretion to Fund Trustees should be, and have been, narrowly applied by the courts.

CONCLUSION

For the reasons set forth in this brief, the summary judgment granted by the District Court should be set aside, and the case remanded for trial.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

BEAM,

Appellant,

against

Affidavit of Personal Service

INTERNATIONAL ORGANIZATION OF MASTERS, MATES, AND PILOTS, et al, Appellees.

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James Steele, *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the **2nd** *day of* **August** *19* 74 *at* **60 East 42nd Street, New York**

deponent served the annexed Appellant's Brief *upon*

Albert E. Rice-Attorney for Appellees

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

James Steele

Print name beneath signature

JAMES STEELE

Sworn to before me, this **2nd** *day of* **August** *19* 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975